Supreme Court, U.S.
FILED
MAY 13 2002
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No. 01-1332

# In the Supreme Court of the United States

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, Div. B, 113 Stat. 1501A-523, creates a statutory copyright license that gives satellite carriers the option to make secondary transmissions of local television broadcasts, without securing the permission of copyright holders, in local markets of the carriers' choosing. 17 U.S.C. 122 (Supp. V 1999). If a satellite carrier invokes that statutory copyright license with respect to any broadcast station in a particular local broadcast market, it must, upon request, carry the signals of all broadcast stations in that local market. 47 U.S.C. 338 (Supp. V 1999).

The question presented is whether the requirement that a satellite carrier that invokes the statutory copyright license to retransmit copyrighted broadcasts in a local market must, upon request, carry the signals of all broadcast stations in that local market violates the First Amendment.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 275 F.3d 337. The opinion of the district court (Pet. App. 75a-129a) is reported at 146 F. Supp. 2d 803.

### JURISDICTION

The judgment of the court of appeals was entered on December 7, 2001. The petition for a writ of certiorari was filed on March 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. The Satellite Home Viewer Improvement Act of 1999 (SHVIA or the Act), Pub. L. No. 106-113, Div. B, 113 Stat. 1501A-523, created a statutory copyright license for the benefit of satellite carriers, which they may exercise at their option. Petitioners, who are satellite carriers, are dissatisfied with the terms of that optional statutory license and, by invoking the First Amendment, seek to expand those terms by avoiding conditions placed on the exercise of the license by Congress.

In the SHVIA, Congress sought to promote competition between satellite carriers and the cable television industry, while taking care not to undermine the goals of the related statutory scheme that regulates cable operators and also minimizing the potentially disruptive effect of satellite carriage on local television broadcasting markets. The Act creates a statutory copyright license that allows satellite carriers to make secondary transmissions of local television broadcasts in markets of the carriers' choosing, without securing the authorization of individual copyright owners of the broadcasts or paying royalties to those copyright owners. In enacting this new license, however, Congress did not allow satellite carriers to choose individual local stations for rebroadcast. Rather, under the SHVIA, if a satellite provider chooses to invoke the statutory license with respect to a particular local market, it must carry, upon request, all local stations in that market. See 17 U.S.C. 122(a) (Supp. V 1999).

b. The SHVIA was enacted against a regulatory background in which satellite carriers had no right to retransmit local television channels into their local markets without obtaining the consent of copyright

owners. Under generally applicable copyright laws, a party seeking to retransmit broadcast television programming must obtain authorization from each owner of a copyright in the various television programs included in the broadcast. See 17 U.S.C. 106(4) and (5) (1994 & Supp. V 1999). Congress has carved out exceptions to the general prohibition on retransmitting copyrighted programs, however, when it has concluded that such exceptions are justified by the public interest in broad dissemination of video programming and when securing authorization of or paying royalties to copyright owners would be impracticable. These exceptions, referred to as compulsory or statutory licenses, permit carriers in specified circumstances to retransmit broadcast signals without obtaining consent from the copyright owners.

In the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (17 U.S.C. 101 *et seq.*), Congress granted such a statutory license to cable television systems, which allowed cable operators to retransmit local broadcast television signals. See 17 U.S.C. 111(c) (1994 & Supp. V 1999). Cable operators may not, however, choose to transmit only certain local stations. Rather, cable operators have long been required—first by regulations of the Federal Communications Commission (FCC or Commission) predating the Copyright Act of 1976, and later by federal statute, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (47 U.S.C. 521 *et seq.*)—to carry any local broadcast signal located in an area served by the cable system. 47 U.S.C. 534(b)(1)(B) and (h)(1)(A) (Supp. V 1999); see Pet. App. 12a-14a. The statutory "must-carry" obligation reflects Congress's concern that, if cable operators refused to carry the full variety of local broadcast channels,

viewers would be deprived of multiple sources of free broadcast programming. This Court upheld that statutory "must-carry" obligation imposed on cable operators in *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*).

c. In 1997 and 1998, Congress conducted an extensive review of the Copyright Act's statutory licensing provisions and their impact on the cable, satellite, and over-the-air broadcast industries. The satellite industry urged Congress to grant satellite carriers a statutory license that would enable them to compete more effectively with cable operators by allowing them to offer broadcast stations to subscribers in those stations' local markets. See *Copyright Licensing Regimes Covering Retransmission of Broadcast Signals: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on Judiciary*, 105th Cong., 1st Sess. 42 (1997). Representatives of the cable industry argued that, to ensure equal treatment between cable and satellite, satellite carriers should be subject to carriage obligations similar to those imposed on cable operators by the cable must-carry law upheld in *Turner II*. See *id.* at 82. Representatives of the broadcast industry expressed concern that selective retransmission of television broadcasts by satellite carriers would undermine the objective of the cable must-carry law that local stations should be able to compete for viewers on an equal footing, and argued that satellite carriers should not be empowered to pick winners and losers in individual local broadcast markets. *Id.* at 154.

In enacting the SHVIA, Congress sought to balance those competing concerns. Congress granted satellite carriers a statutory copyright license that a carrier may invoke, free of obligation to pay royalties, for any

particular local market of its choosing. See 17 U.S.C. 122(a) and (c) (Supp. V 1999). (Satellite carriers also remain free, as before, to obtain the authorization of copyright owners of broadcast programming for retransmission, through the operation of the traditional copyright system.) Congress did not, however, impose on satellite carriers a "must-carry" obligation identical to the obligation imposed on cable operators. Rather, Congress structured the statutory copyright license in a manner intended to prevent satellite carriers from disrupting competition in local broadcast markets. Instead of granting satellite carriers a station-by-station license, which would have allowed satellite carriers to choose to carry only certain broadcast stations in a local market, Congress created a market-by-market license. Thus, if the satellite carrier chooses to invoke the statutory copyright license for a particular market, it must carry all local broadcast stations in that market that request carriage. See 47 U.S.C. 338(a)(1) (Supp. V 1999).[1]

The Conference Report accompanying the SHVIA explains that the terms of satellite carriers' statutory copyright license reflect three guiding principles. First, Congress sought to promote competition between the cable and satellite industries by allowing satellite companies to carry local broadcast stations, as cable operators had long been allowed to do. Second, Congress intended not to interfere with traditional network broadcasting practices that foster local affiliates. Third,

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[1] A carrier is not, however, required to carry a local commercial broadcast station if the signal would substantially duplicate the signal of another local commercial station, and is also not required to carry more than one network affiliate in a particular market, unless the two affiliates are licensed to communities in different States. See 47 U.S.C. 338(c)(1) (Supp. V 1999).

Congress wished to minimize disruption of existing local broadcast markets. See H.R. Conf. Rep. No. 464, 106th Cong., 1st Sess. 92 (1999).

Congress was especially concerned that a grant of a compulsory license to satellite carriers might inadvertently undermine the diverse local markets in free broadcast television that had been carefully fostered by the regulatory regimes governing the broadcast and cable industries. See H.R. Conf. Rep. No. 464, *supra*, at 101. By providing a statutory license only "on a market-by-market basis," Congress intended to prevent satellite carriers from using the license "to carry only certain stations and effectively preventing many other local broadcasters from reaching" their potential audience. *Ibid.* Congress feared that a different kind of statutory license, allowing satellite companies to carry only particular broadcast stations within a local market, would have undermined the government's longstanding interest in maintaining a broad and diverse array of options in free over-the-air television. Congress noted that, as the attractiveness of satellite service increased (by offering broadcast stations including network affiliates' signals, to local customers), satellite subscribers would be less likely also to install or maintain antennas to receive over-the-air broadcasts. See *id.* at 101-102.

2. On September 20, 2000, petitioners filed suit in district court, alleging (among other things) that the terms of the statutory copyright license granted to satellite carriers by the SHVIA infringed the carriers' First Amendment rights. On November 30, 2000, while the district court action was proceeding, the FCC adopted regulations implementing the carriage obligations that a direct broadcast satellite provider triggers by electing to carry local stations in a particular designated market area via the statutory copyright license.

Following publication of the Commission's order, petitioners filed petitions for review in the court of appeals, also raising First Amendment contentions. On June 19, 2001, the district court rejected petitioners' constitutional challenges and dismissed their action. See Pet. App. 75a-129a. Petitioners pursued an appeal, which the court of appeals consolidated with the petition for review.

3. The court of appeals affirmed the dismissal of petitioners' constitutional challenge, and also denied their petition for review. See Pet. App. 1a-66a.[2]

a. The court first rejected petitioners' effort to cast the SHVIA as a content-based restriction on speech. See Pet. App. 27a-33a.[3] The court noted that the SHVIA does not impose any burden on a satellite carrier's retransmission of local broadcasts per se: a satellite company that rebroadcasts a local station pursuant to negotiated copyright clearances incurs no obligation under the SHVIA. See *id.* at 30a. The

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[2] The court of appeals also denied petitions for review of the FCC's order brought by representatives of the local broadcast industry, concerning the terms on which satellite carriers may offer local broadcast stations to subscribers. See Pet. App. 60a-65a. That issue is not directly relevant to the constitutional issues presented in the certiorari petition and will not be discussed further.

[3] The government had argued that, because a satellite carrier's obligation is triggered only by the carrier's voluntary decision to invoke the statutory copyright license (rather than to obtain authorization from copyright owners for retransmission), the "carry one, carry all" rule does not impose any burden on satellite carriers' speech and thus should be evaluated under the rational-basis test rather than a heightened level of First Amendment scrutiny. Because the court held that the SHVIA satisfies intermediate scrutiny, the court found it unnecessary to decide whether a lesser standard of scrutiny is appropriate. See Pet. App. 33a n.6.

carriage obligation arises only to the extent that a satellite carrier invokes the statutory copyright license for a particular market. See *ibid.* The distinction between carriers that make private arrangements and those that choose to take advantage of a favorable statutory alternative is, the court held, "content-neutral on its face." *Id.* at 31a. The court also ruled that Congress's determination to ensure that a statutory license would not disrupt the existing local broadcast market is a content-neutral purpose, and observed that this Court had come to the same conclusion when it upheld the cable must-carry law in *Turner II*. See *id.* at 31a-32a.

b. The court further ruled that the SHVIA satisfies intermediate scrutiny under the framework of *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), pursuant to which a regulation will be upheld if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See Pet. App. 33a-53a.

The court held that the SHVIA serves two distinct substantial governmental interests that are unrelated to the suppression of speech. First, Congress has a substantial interest in ensuring that the SHVIA statutory license does not undermine an important goal of the regulatory regime governing cable operators, namely, the preservation of a diverse array of free over-the-air local broadcast options for those who do not subscribe to pay services such as cable or satellite television. See Pet. App. 35a-48a. The court ruled that Congress had an ample basis to conclude that satellite carriers, strengthened by a statutory license, would capture a large share of television households, and that,

if the satellite companies were able to cherry-pick individual broadcast stations within markets for carriage, stations that were not carried would be injured by the loss of access to potential viewers. See *id.* at 38a-44a. The court rejected the carriers' arguments that, in determining whether broadcast stations' access to viewers could be impaired by the grant of a statutory license without a "carry one, carry all" requirement, Congress should have considered only the relatively small share of the television households that satellite carriers reached before obtaining the statutory license. Rather, the court made clear, Congress could "view the regulatory landscape as a whole by considering the cumulative effects [on broadcast stations] of cable and satellite." *Id.* at 47a-48a.

Second, the court held that Congress has a substantial interest in "preventing SHVIA's grant of a statutory copyright license to satellite carriers from undermining competition in local markets for broadcast television advertising." Pet. App. 48a-49a. A station-by-station license, under which stations not chosen for carriage would lose satellite customers as potential viewers, would have had a serious impact on the ability of independent stations and of emerging television networks to compete for local television advertising. See *id.* at 50a. "By choosing a market-by-market license, Congress acted to minimize the unintended, disruptive effects of its intervention in the television marketplace." *Id.* at 51a.

c. In light of the substantial interests furthered by the SHVIA, the court readily ruled that the "carry one, carry all" term of the copyright license satisfies the requirement of *O'Brien* that any restriction on speech be narrowly tailored. See Pet. App. 52a-53a. The court observed that the carriers had conceded that, absent

that rule, "they would have chosen to carry only major network affiliates in many local markets and would therefore have threatened independent broadcasters with the very harms that Congress sought to prevent." *Id.* at 52a. As the court explained, any statutory license without an attendant carriage requirement "would have been significantly less effective—indeed, it would have been completely ineffective—in advancing the government's interests." *Id.* at 53a.

## ARGUMENT

The court of appeals correctly upheld the carriage obligations that are terms of the statutory copyright license granted to satellite carriers by the SHVIA. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The challenged provision of the SHVIA does not restrict petitioners' speech. To the contrary, the copyright license granted by the SHVIA enables satellite carriers to carry programming that they might not otherwise be able to carry, because of the operation of generally applicable principles of copyright law. It is copyright law, not the SHVIA, that prevents petitioners from utilizing the intellectual property of others without their consent. Petitioners do not challenge those underlying and generally applicable restrictions imposed by copyright law, and such a challenge would, in any event, be baseless. See *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985); *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989) (cable operators have no "first amendment right to express themselves using the copyrighted materials of others").

Petitioners argue that, as a practical matter, it is difficult or impossible to negotiate agreements with copyright holders. Pet. 22-24. But that quarrel is not with the SHVIA license—which is an enormously valuable and extraordinary benefit in the form of an exemption from generally applicable copyright laws, and which vastly expands petitioners' ability to carry broadcast stations. It is, instead, a quarrel with the limitations imposed by the copyright laws on petitioners' right to carry others' programming. The First Amendment does not, however, require that petitioners be granted any larger dispensation from the copyright laws than that provided by Congress in the SHVIA.

Rather than restricting speech, the SHVIA license allows satellite carriers to use the property of others without regard to background copyright restrictions. If petitioners do not wish to make use of the statutory license in any market because they are dissatisfied with the terms of that license, they remain free to negotiate the carriage of individual broadcast stations and to carry other programming as well, just as before passage of the SHVIA. The SHVIA thus "do[es] not produce any net decrease in the amount of available speech." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 647 (1994) (*Turner I*). There is therefore no basis for petitioners' alarmist assertion (Pet. 12) that the decision below "grants Congress a blank check to suppress speech whenever it concludes that the marketplace of ideas needs a larger or more diverse rostrum of speakers." The SHVIA license does not suppress anyone's speech; to the contrary, it promotes the broad dissemination of video programming by enabling satellite carriers to carry local broadcast signals without obtaining the ordinary copyright clearances.

At bottom, petitioners fundamentally misapprehend the nature of the license granted by 17 U.S.C. 122 (Supp. V 1999). Congress did not create an unrestricted statutory license to retransmit a single station in a given market and then attach restrictions on free expression as conditions to that new "right." Rather, the various requirements of Section 122 and of 47 U.S.C. 338 (Supp. V 1999), including the market-carriage provision, are essential terms of the license itself, which expands petitioners' opportunity to engage in speech. As the Conference Report explained, the SHVIA compulsory license is "available only on a market-by-market basis," H.R. Conf. Rep. No. 464, *supra*, at 100. But that license does not restrict petitioners' speech; it increases speech.

2. Petitioners contend (Pet. 21-25) that the SHVIA is content-based and therefore should be subject to strict scrutiny, rather than the intermediate scrutiny test of *O'Brien*. The court of appeals correctly ruled, however, that SHVIA is content-neutral. Pet. App. 29a-33a. That ruling is fully consistent with, and indeed follows from, this Court's decisions in *Turner I* and *Turner II*.

The central inquiry in determining whether a regulation is content-based is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner I*, 512 U.S. at 642. In *Turner I*, this Court held, in the cable context, that a requirement to carry all broadcast stations in a particular local market is content-neutral. See *id.* at 643 (recognizing that the cable "must-carry" rules "impose burdens and confer benefits without reference to the content of speech"). The SHVIA presents an *a fortiori* case: unlike the cable must-carry law (which was not fashioned as a

condition on the statutory copyright license afforded to cable operators but rather is a freestanding mandate), the satellite carriers are free to ignore the carriage obligations that are part of their statutory copyright license. See H.R. Conf. Rep. No. 464, *supra*, at 101 ("Rather than require carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license."). Unlike cable operators, satellite providers may choose whether they wish, in a particular market, to offer (1) only national programming, (2) national programming together with local broadcast programming for which the carrier has obtained the copyright holders' consent, or (3) national programming and all local broadcasts pursuant to the statutory license.

Petitioners argue (Pet. 21-22) that, unlike the cable must-carry law, the "carry one, carry all" rule for satellite carriers is content-based because the carriage obligation is triggered by a satellite carrier's decision to carry any local *station*, whereas the cable operator's obligation to carry local stations turns on the operator's decision to serve a particular *market*. To support that contention, petitioners seize on a single phrase in the *Turner I* decision (see Pet. 21), where the Court observed that the cable must-carry rules did not turn on "programs *or stations* the cable operator has selected or will select." 512 U.S. at 644 (emphasis added).

In that passage, however, the Court was explaining that the operation of the must-carry law did not turn on a cable operator's decision to carry any *particular* program or station. So too here, the SHVIA regime does not depend on the satellite carrier's choice of a *particular* program or station (or group of stations).

The carriage obligation comes into play when the satellite carrier exercises its statutory license with respect to any local broadcast station, be it one of the network affiliates, an independent commercial station, or a public broadcasting station. The content of the programming carried by the station that the carrier prefers is irrelevant to the operation of the "carry one, carry all" rule. Indeed, as the court of appeals observed, in a strict sense the rule turns not on the satellite carrier's decision to carry a broadcast station, but rather on its decision to do so using the statutory license—to transmit programming "by using one set of economic arrangements rather than another." Pet. App. 30a-31a; compare *Turner I*, 512 U.S. at 645 (holding that a distinction "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry" is content-neutral).[4]

Nor, contrary to petitioners' contention (Pet. 24-25), is SHVIA's purpose related to content. As we note above, Congress identified three purposes in enacting the SHVIA statutory license: (1) granting satellite carriers a statutory copyright license to enhance the satel-

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[4] Petitioners' attempt (Pet. 22) to analogize this case to *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is without merit. *Tornillo* invalidated a "right of reply" statute, which guaranteed a candidate for state election the right to reply in a newspaper whenever that newspaper made any attack on the candidate's personal character or charged the candidate with malfeasance in office. See *id.* at 244-245 n.2. The operation of the statute in *Tornillo* turned entirely on the content of the article previously run by the newspaper—namely, criticism of the candidate. See *id.* at 256 (noting that the statute "exact[ed] a penalty on the basis of * * * content"). The carriage obligations at issue here, however, "are not activated by any particular message spoken by [satellite carriers] and thus exact no content-based penalty." *Turner I*, 512 U.S. at 655 (distinguishing *Tornillo*).

lite industry's ability to compete effectively with cable carriers; (2) avoiding undermining the goals of cable's regulatory scheme; and (3) minimizing disruption of the existing market for local broadcast programming. See pp. 5-6, *supra*; H.R. Conf. Rep. No. 464, *supra*, at 92, 101-102. Petitioners argue (Pet. 24-25) that Congress acted to protect independent local broadcasters as a group, and that this purpose is fatal to the statute. But there is no reason to believe that Congress was motivated by any perceived differences in content between programming carried by independent local broadcasters and programming carried by others. As the Court explained in *Turner I*, even laws favoring some speakers over others require strict scrutiny only when "the legislature's speaker preference reflects a content preference." 512 U.S. at 658.[5] No such content preference is reflected in the SHVIA.

3. The market-based scope of the SHVIA license satisfies intermediate scrutiny. Congress's approach "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary." *Turner II*, 520 U.S. at 189. As we have explained, the SHVIA furthers the governmental interest of establishing a copyright licensing scheme that enables satellite carriers to compete fairly with cable operators, while disrupting as little as possible the market for audience and advertisers in which local broadcast stations operate. See pp. 5-6, *supra*; H.R. Conf. Rep. No. 464, *supra*, at 92.

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[5] In making that point, the Court in *Turner I* rejected an argument based on *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that is essentially identical to the argument raised by petitioners here (see Pet. 14, 17).

While providing a valuable new benefit to satellite carriers, Congress wished to avoid inadvertently threatening local broadcast stations by making them less attractive to advertisers. Congress understood that a station-by-station statutory license would provide stations chosen for satellite carriage with access to a sizeable and growing audience, but that that audience would become largely unavailable to those stations that were not selected for carriage, even though those stations had previously reached an audience through free over-the-air broadcasts. See H.R. Conf. Rep. No. 464, *supra*, at 101. As with broadcast stations that would not be chosen for carriage by cable operators in the absence of the cable must-carry law, broadcast stations not chosen by satellite carriers would face the problem that consumers would dismantle (or not erect) television antennas or would not be willing to switch between satellite and over-the-air reception. See *id.* at 102; cf. *Turner II*, 520 U.S. at 219-221.

Congress was therefore concerned that local broadcast stations could be imperiled *because* Congress had granted satellite carriers a statutory exemption from generally applicable copyright laws. Creation of a statutory license that permitted satellite carriers to carry some, but not all, stations in a local market without regard to copyright restrictions would significantly change the playing field on which local stations compete for local advertising dollars. As the court of appeals recognized, "[b]y choosing a market-by-market license, Congress acted to minimize the unintended, disruptive effects of its intervention in the television marketplace." Pet. App. 51a. Thus, contrary to petitioners' submission (Pet. 15-21), the SHVIA does not rest simply on Congress's wish to ensure a diversity of broadcast options (although Congress plainly did perceive

that such diversity is an important government interest, and this Court has agreed, see *Turner I*, 512 U.S. at 647, 649). Rather, Congress acted to ensure that this important interest would not be undermined by its own alteration of the copyright regime.

In any event, there can be no serious doubt that the preservation of a diversity of outlets for broadcast video programming is an important governmental interest, even if the threat to that diversity does not come from purposeful anti-competitive conduct. In *Turner II*, the Court made clear that the cable must-carry law was enacted to promote three *independent* important governmental interests, two of which were "preserving the benefits of free, over-the-air local broadcast television" and "promoting the widespread dissemination of information from a multiplicity of sources"; the third interest was "promoting fair competition in the market for television programming." 520 U.S. at 189. The Court "reaffirmed" in *Turner II* that "*each of those* is an important governmental interest." *Id.* at 189-190 (emphasis added).[6]

The Court in *Turner II* specifically rejected the dissent's assertion that the cable must-carry law could be justified *only* to protect broadcasters from cable opera-

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[6] See also *Turner II*, 520 U.S. at 190 (identifying a "governmental purpose of the highest order in ensuring public access to a multiplicity of information sources") (internal quotation marks omitted); *id.* at 192 (noting that "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public") (internal quotation marks omitted); *id.* at 194 (stressing that "[f]ederal policy * * * has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation").

tors' anti-competitive conduct. 520 U.S. at 194. The Court stressed, rather, that in light of the "essential part of the national discourse on subjects across the whole broad spectrum" served by broadcast programming, "Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." *Ibid.* The same interest is sufficient to justify the terms of the satellite copyright license, which ensure that a multiplicity of broadcasters remain available to reach those who receive only over-the-air video signals as well as those who subscribe to cable and satellite services.

Congress also properly viewed the regulatory landscape as a whole and considered the overall impact on free television and programming diversity of cable and satellite providers together. See Pet. App. 35a-48a. Subscribers to satellite carriers, like subscribers to cable systems, often do not maintain (or do not utilize) antennas to receive over-the-air broadcasts but rather receive their video programming through the subscription service. See H.R. Conf. Rep. No. 464, *supra*, at 101-102; Pet. App. 42a n.8. In combination, cable and satellite providers represent a significantly *greater* threat to free broadcast television than was posed by cable in 1992 when Congress adopted the cable must-carry law that the Court upheld in *Turner II*. Compare *Turner II*, 520 U.S. at 197 (opinion of Kennedy, J.) (noting that cable had 60% share of television households in 1992) with Pet. App. 46a (noting that cable and satellite together control access to 80% of television households). Congress created a coherent regulatory structure that takes into account the cumulative impact of both cable

and satellite carriage on the availability of broadcast programming. See *id.* at 44a-48a.

Such an approach was particularly appropriate given the SHVIA's purpose of promoting fair competition between satellite carriers and cable operators. Petitioners essentially argue (Pet. 27) that Congress should have allowed satellite carriers to be selective in choosing among stations within a local broadcast market for carriage, without being required to pay compensation to copyright holders, even while cable operators remained subject to the strictures of the cable must-carry law. But such a regulatory regime would have significantly undermined Congress's intent that satellite and cable operators compete on fair terms. Congress wanted the SHVIA to ensure that satellite would be an "effective competitor" to cable, see H.R. Conf. Rep. No. 464, *supra*, at 92, but petitioners argue that the First Amendment required Congress to give satellite carriers terms of competition that are significantly more advantageous than those offered to cable operators. There is no grounding for that submission in the First Amendment.

4. Finally, even if petitioners' constitutional arguments had merit, the courts could not give petitioners the relief that they ultimately seek, a station-by-station statutory license. The market-wide nature of the statutory license is an integral part of the SHVIA scheme and is not severable from the grant of the statutory license to carry broadcast programs without compensation to copyright owners. As the court of appeals pointed out, Congress expressly considered and rejected the idea of giving petitioners a station-by-station license. See Pet. App. 23a-24a; H.R. Rep. No. 86, 106th Cong., 1st Sess. Pt. 1, at 16 (1999) ("In no event shall the [FCC] impose less than full must-carry on satellite

carriers that make local retransmission of television broadcast stations."). Indeed, Congress further provided that a satellite carrier that violates the full-market rules has no statutory copyright license and is expressly subject to liability and damages for copyright infringement. See 47 U.S.C. 338(a)(2) (Supp. V 1999); 17 U.S.C. 501(f) (Supp. V 1999).

This case presents a situation where Congress would not have enacted the legislation without the provision under constitutional challenge. Compare *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). Thus, if the market-based aspect of the SHVIA statutory license were found to violate the First Amendment, the courts would be obligated to invalidate the statutory license for satellite carriers in its entirety. Where, as here, a statute reflects an express trade-off of interests, with the regulated parties' benefits balanced by burdens, courts have recognized that it is inappropriate to permit the benefits to stand after the burdens have been struck down. See *Western States Med. Ctr.* v. *Shalala*, 238 F.3d 1090, 1096 (9th Cir. 2001) ("A statute's unconstitutional provisions are not severable if the entire statute is designed to strike a balance between competing interests."), aff'd on other grounds, No. 01-344 (Apr. 29, 2002); cf. *Bellsouth Corp.* v. *FCC*, 144 F.3d 58, 66 n.8 (D.C. Cir. 1998) ("[I]t is doubtful that Congress would have intended the many provisions of the Act beneficial to the [Bell operating companies] to survive deletion of this burdensome one[.]"), cert. denied, 526 U.S. 1086 (1999).

Thus, if this Court were to strike down the market-based term of the SHVIA license, it would be necessary to set aside the statutory license provision in its entirety. Petitioners would thereby have lost the right to invoke any statutory license to carry broadcast pro-

gramming without the copyright owners' authorization. Accordingly, whether or not this Court exercises review in this case, the only way that petitioners can obtain a statutory license to carry only particular local stations without compensating the copyright owners is to persuade Congress to adopt one.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2002